IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

WRIT PETITION NO. 3050 OF 2006

Mumbai Kamgar Sabha. ... Petitioner.

V/s.

M/s. Akabarallys & Anr. ... Respondents.

....

Mr.C.U. Singh, Sr.Counsel alongwith Sowjanya Menon, Oindrila Maitra, H. Yogesh Kumar i/b. Paras Kuhad & Associates for the Petitioners.

Mr. R.V. Paranjape for the Respondents.

CORAM : DR. D.Y.CHANDRACHUD,J.

13TH DECEMBER, 2006.

P.C. :

1. The Industrial Court in a complaint of Unfair Labour Practices under Items 9 and 10 of Schedule IV of the M.R.T.U.& P.U.L.P. Act, 1971 has come to the conclusion that the employer is not guilty of an Unfair Labour Practice. The dispute related to the claim of the workmen at the Fort and Chembur establishment of the First Respondent, which conducts Departmental Stores, to the payment of bonus. The last settlement dated 18th March 2002 was terminated and a charter of

demands has been submitted by the Union. Under the settlement, the management agreed to continue to pay to the workmen an annual bonus equivalent to 24.75% of the total earnings inclusive of basic bay and D.A. till the expiry of the agreement. The mode and manner of the payment was to continue as in the past and bonus was to be paid in any case before Diwali.

2. Before the Industrial Court, it was urged that the payment of bonus was an implicit condition of service and that payment should be continued even after the settlement had expired. The Labour court held that the payment of bonus was not proved to be a condition of service and since the settlement expressly provided that payment would be made until the settlement expired, the workmen were not entitled to payment thereafter.

3. At the hearing of the Petition, it was urged on behalf of the Petitioner that the payment of bonus had assumed a customary character. Reliance was placed on the Judgment of the Supreme Court in **Workmen V/s. Kettlewell Bullen & Co. Ltd.** (1994) 2 SCC 357 wherein the Court followed the earlier Judgment in **Graham**

Trading Co. V/s. Workmen AIR 1959 SC 1151. The Supreme Court had explained the concept of customary bonus in the following terms in the Judgment in **Graham Trading** :

> " 4(i) Whether the payment has been over an unbroken series of years; (ii) whether it has been for a sufficiently long period, though the length of the period might depend on the circumstances of each case: even so the period may normally have to be longer to justify an inference of traditional and customary Puja bonus than may be the case with Puja bonus based on an implied term of employment; (iii) the circumstance that the payment depended upon the earning of profits would have to be excluded and therefore it must be shown that payment was made in years of loss. In dealing with the question of custom, the fact that the payment was called ex gratia by the employer when it was made, would, however, make no difference in this regard because the proof of custom depends upon the effect of the relevant factors enumerated by us; and it would not be materially affected by unilateral declarations of one party when the said declarations are inconsistent with the course of conduct adopted by it; and (iv) the payment must have been at a uniform rate throughout to justify an inference that the payment at such and such rate had become customary and traditional in the particular concern."

4. The question as to whether the payment of bonus has assumed a customary character is dependant upon whether the payment has been made over an an unbroken period of time, over a sufficiently long period

irrespective of whether profits have been made and on a uniform rate through out so as to justify an inference that the payment has become customary and traditional, in the concern. This is essentially a matter of fact to be decided on evidence. In the present case, from the Judgement of the Industrial Tribunal, it appears that both the management as well as the Union informed the Industrial Court that no oral evidence was being adduced. The matter proceeded entirely on the basis of pleadings and documentary material.

5. Confronted with the difficulty that there is absolutely no oral evidence that could assist the Court in arriving at the conclusion as to whether the bonus that was being paid had assumed the character of customary bonus, Counsel appearing on behalf of the Petitioner has taken instructions on whether the Petitioner would seek to press this proceeding any further. That apart, it also emerges from the pleadings in the complaint that the case of the Petitioner was not founded on the existence of a practice to pay bonus as a matter of custom and tradition but on an implicit condition of service.

6. In these circumstances, upon taking instructions, Counsel appearing on behalf of the Petitioner has informed the Court that the Petitioner would not press these proceedings any further that he would seek liberty to either institute a fresh complaint incorporating necessary averments in regard to the payment of customary bonus or seek an alternative remedy in the form of a reference under Section 10 of the Industrial Dispute Act. 1047. The prayer made on behalf of the Petitioner for seeking liberty to do so is not opposed on behalf of the Respondent subject to the Court keeping open all the rights and contentions of the Respondents in proceedings which may be adopted by the Petitioner.

7. The Petition is accordingly disposed of as withdrawn, since no other point has been pressed on either side, granting liberty to the Petitioner to adopt appropriate proceedings in accordance with law. All the rights and contentions of the Respondents therein are kept open.